

NO. 42511-4-II
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MARTHA G. VASQUEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Paula Casey, Judge
Cause No. 11-1-00644-5

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count I, unlawful possession of methamphetamine with intent to deliver, from the jury for lack of sufficiency of the evidence.
02. The trial court erred in not taking count II, unlawful use of a building for drug purposes, from the jury for lack of sufficiency of the evidence.
03. The trial court erred in imposing a 24-month sentencing enhancement for an offense alleged to have occurred within 1,000 feet of a school bus route stop.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence to support Vasquez's conviction for unlawful possession of methamphetamine with intent to deliver, as charged in count I? [Assignment of Error No. 1].
02. Whether there was sufficient evidence to support Vasquez's conviction for unlawful use of a building for drug purposes, as charged in count II? [Assignment of Error No. 2].
03. Whether the State failed to present sufficient evidence of where the school bus route stops were located on the date of the offense? [Assignment of Error No. 3].

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C. STATEMENT OF THE CASE

01. Procedural Facts

Martha G. Vasquez (Vasquez) was charged by first amended information filed in Thurston County Superior Court on July 5, 2011, with unlawful possession of methamphetamine with intent to deliver within 1,000 feet of a school bus route stop, count I, and unlawful use of a building for drug purposes, count II, contrary to RCWs 69.50.401(2)(b), 69.50.435(1) and 69.53.010, respectively. [CP 9-10].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 7]. Trial to a jury commenced on July 12, the Honorable Paula Casey presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 299].

The jury returned verdicts of guilty as charged, including enhancement, Vasquez was sentenced within her standard range and timely notice of this appeal followed. [CP 44-46, 50-60].

02. Substantive Facts

Between March 28 and April 14, 2011, the police used a confidential informant to conduct three separate controlled buys of approximately one ounce of methamphetamine on each occasion from Pech Canche for the total purchase price of \$3,000. [RP 44-46, 48, 52-55].

On April 26, search warrants were simultaneously executed on two pieces of property owned by Canche and/or his wife, Virginia Santos Jimenez: their primary residence on Garfield Avenue (Garfield house) and a trailer on Steilacoom Road (Steilacoom trailer). [RP 33-37, 39-40, 58-59, 80].

Canche and his wife were taken into custody when the warrant was served at the Garfield house. [RP 34, 36]. Approximately 1,829 grams of methamphetamine with an estimated street value of \$155,500 was seized from the residence along with packaging material (baggies) and more than \$60,000 in cash bundles. [RP 66-67, 285-89].

Vasquez and Leobardo Santos Pioquinto, who was alleged to be the brother or cousin of Jimenez [RP 35], were in the trailer at the Steilacoom property when the warrant was served. [RP 37-38, 95, 112]. Photographs of Vasquez and Pioquinto were found in the trailer along with two digital scales, cash in excess of \$9,000 and 281.3 grams of methamphetamine with an estimated street value of approximately \$24,000. [RP 71, 118, 126, 129-132, 135-36, 176-77, 285-89]. A search of a vehicle at the trailer registered to Vasquez produced no evidence. [RP 72-74, 87-88, 168].

The Steilacoom trailer was within one thousand feet of a school bus route stop designated by a school district. [RP 148-150, 278-280].

Vasquez rested without presenting evidence. [RP 290].

D. ARGUMENT

01. INSUFFICIENT EVIDENCE SUPPORTS
VASQUEZ'S CONVICTIONS FOR
POSSESSION OF METHAMPHETAMINE
WITH INTENT TO DELIVER AND UNLAWFUL
USE OF A BUILDING FOR DRUG PURPOSES.¹

Due Process requires the State to prove beyond a reasonable doubt all necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the

¹ As the basic legal test to determine the sufficiency of the evidence is the same for each offense, the offenses are addressed collectively herein for the purpose of avoiding needless duplication.

State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

As charged and instructed in this case, as in many cases, the State was required to prove that Vasquez was guilty of the charged offenses either as a principal or as an accomplice. [CP 9-10, 36, 41]. And it is clear the State went forward on the latter theory. During closing, the prosecutor told the jury, "... as I said kind of at the start, this is what's called an accomplice liability case [RP 316](,)" further noting that he carried no burden "to prove who was doing the acts, just that they were acting in concert to support one another." [RP 318]. He even admitted that "yeah, these probably are Pech Canche's drugs. There's no doubt about it ... but each person plays their part." [RP 375-76]. According to Detective Casebolt, "the primary targets of the investigation" were Canche and his wife. [RP 60].

The State's case against Vasquez was circumstantial, mainly consisting of inferences to be drawn from evidence that she was connected to the trailer by the Comcast bill for internet services beginning March 11, and that she benefited from the operation, as evidenced by her sending money grams back to Mexico and the fact that her Acura Integra was paid for. But this evidence does not establish that Vasquez was guilty either as a principal or as an accomplice to either offense. There was no evidence she ever

helped anyone do anything, no evidence she used drugs, no evidence she ever sold or gave drugs to anyone, no evidence she was related to anyone involved in the case, no evidence she was connected to any of the three controlled buys, no evidence of what money was used to pay for her car or money grams, no evidence she was even a suspect prior to the execution of the search warrant on the Steilacoom trailer, no evidence as to when she arrived at the trailer that day, no evidence how long the drugs found in the trailer had been there, no evidence that clothes found in the trailer fit or belonged to her and no evidence that she had ever been to Canche's residence on Garfield Avenue.

The State failed to carry its burden to prove Vasquez guilty of the charged offenses as either a principle or as an accomplice. See State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993) ("A defendant is not guilty as an accomplice unless he has associated with and participated in the venture as something he wished to happen and which he sought by his acts to succeed." Citations omitted); see also State v. Robinson, 73 Wn. App. 851, 897 P.2d 43 (1994). The evidence must demonstrate more than that the accused was present and knew what was going to happen. In order to convict under an accomplice liability theory, the State must demonstrate some nexus between the party committing the act and the party deemed the accomplice. State v. Wilson, 95 Wn.2d 828, 631 P.2d

362 (1981). A defendant's presence at the scene of criminal activity combined with knowledge of the criminal activity, does not establish accomplice liability. In re Wilson, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979); State v. Amezola, 49 Wn. App. 74, 89, 741 P.2d 1024 (1987). The State must also show that the defendant "associates himself with the undertaking, participates in it as something he desires to bring about, and seeks by his actions to make it succeed." In re Wilson, 91 Wn.2d at 491. Here, the State did not demonstrate a sufficient connection between Vasquez and the criminal activity at issue.

02. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE SCHOOL BUS ROUTE STOP ENHANCEMENT BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE OF WHERE THE SCHOOL BUS ROUTE STOPS WERE ON THE DATE OF THE OFFENSE.²

During closing, the State argued there were five school bus route stops in the mobile home park within a thousand feet of the Steilacoom trailer, and that one had been measured by Detective Clark: "And the distance between the trailer at 88 and the stop out in front of 127 was 356 feet, well within a thousand feet of a school bus route stop." [RP 326]. This was based on the testimony of Eric Wright from the North

² The prior discussion relating to the test for the sufficiency of the evidence is incorporated herein for the sole purpose of avoiding needless duplication.

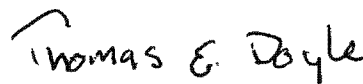
Thurston Public School District and Detective Clark. Referencing an aerial map (State's Exhibit 71), Wright had testified that all five of the bus stops were within 800 feet of the trailer. [RP 280-81].

Here, while the State did present the aforementioned map and testimony, it did not present any evidence suggesting that the school bus route stops were at the locations indicated on the date of the offenses. There was simply a complete absence of testimony or other evidence establishing that the school bus route stops existed on the day of the offenses, with the result that the evidence is insufficient to support the enhancement.

E. CONCLUSION

Based on the above, Vasquez respectfully requests this court to reverse and dismiss her convictions for unlawful possession of methamphetamine with intent to deliver within 1,000 feet of a school bus route stop and unlawful use of a building for drug purposes and/or to remand for resentencing consistent with the arguments presented herein.

DATED this 22nd day of March 2012.

Handwritten signature of Thomas E. Doyle in black ink.

THOMAS E. DOYLE
WSBA NO. 10634

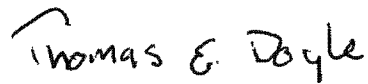
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 22nd day of March 2012.

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